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**By ECF, E-mail (ForrestNYSDChambers@nysd.uscourts.gov) and Regular Mail**

January 13, 2016

The Honorable Katherine B. Forrest  
United States District Court  
Southern District of New York  
500 Pearl Street, Room 1950  
New York, NY 10007

Re: SEC v. Michael J. Xirinachs, 09-CV-7594 (KBF)

Dear Judge Forrest:

I represent Defendant Michael J. Xirinachs in the above-captioned action. Pursuant to the Court's Orders of December 11, 2015 and January 12, 2016, this letter responds with the rationale as to why Mr. Xirinachs' believes the proposed language set forth in our letter of January 11, 2016 [Doc. No. 212] should be included.

Huntington Real Property: Mr. Xirinachs understanding of the settlement of the hearing is set forth in the transcript of the October 2, 2015 hearing (excerpt attached as Ex. A). There, SEC counsel stated, "With respect to the sale of the property, the lien priority is whatever the liens are is what is going to be paid. We're not going to pay items that don't have liens on the property. First in time, first in right." (Tr. at 19.)

Counsel for Mr. Xirinachs subsequently sought clarification (Tr. at 20-21):

MR. LEVINE: With respect to Mr. Roessner's description of what I understand him saying, just so we're completely clear here. We don't want any ambiguity. When the liquidating agent sells the Baycrest property, the Huntington property, whatever existing priorities are in place now, they will have to be paid. They will be paid. And once those are -- the existing priorities, whatever is there. Whatever is left, they get.

THE COURT: I would assume you can't do any more than that. Is that right, Mr. Roessner?

MR. ROESSNER: Yes, your Honor. I envision this would be like a DoJ foreclosure. When the receiver is done, they'll make a report we'll submit to the Court about the distribution schedule and probably request a final order of payout, is the way I envision that would work.

Accordingly, the language we proposed in our January 11 letter reflects this understanding, that the SEC agrees to ensure payment of liens that have priority over the SEC's judgment. The proposed language thus defines "bona fide lien" to mean "any judgment or lien recorded against Xirinachs and/or the Property prior to the time of the recording of the judgment against Xirinachs by the SEC." Given that Mr. Xirinachs' 100 percent personal interest in the LLC that fully owns the Huntington property is being used to satisfy the SEC's judgment, this proposed language is appropriate.

Xirinachs' Personal Property: With respect to the SEC's additional assertion regarding Mr. Xirinachs' personal property located at the 30 Baycrest Drive property, although this subject matter does not appear to be encompassed by the Court's Orders at issue, or the Liquidating Agent's proposed Order, I am nonetheless informed that Mr. Xirinachs is not selling such property.

\* \* \* \*

We thank the Court for its courtesy and consideration.

Respectfully submitted,



Matthew L. Levine

Cc (by ECF & e-mail):  
Michael Roessner, Esq.  
Leslie S. Barr, Esq.

# **EXHIBIT A**

FA23SECH

1

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x  
4 SECURITIES AND EXCHANGE  
5 COMMISSION,

6 Plaintiff,

7 v.

09 CV 7594 (KBF)

8 DOYLE SCOTT ELLIOTT, et al.,

9 Defendants.  
10 -----x

New York, N.Y.  
October 2, 2015  
1:00 p.m.

11 Before:

12 HON. KATHERINE B. FORREST,

13 District Judge

14 APPEARANCES

15 UNITED STATES SECURITIES AND EXCHANGE COMMISSION

16 BY: MICHAEL J. ROESSNER

MARSHA MASSEY

17 MATTHEW L. LEVINE

18 Attorney for Defendant Michael J. Xirinachs  
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22  
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25

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1 future, you're able to settle the future and/or reach some  
2 other accommodation so we don't have to be back here again.

3 MR. ROESSNER: That's correct, your Honor. With  
4 respect to the sale of the property, the lien priority is  
5 whatever the liens are is what is going to be paid. The  
6 mortgage will be paid first. First in time, first in right.  
7 We're not going to pay items that don't have liens on the  
8 property. There is a mortgage on the property. If there is  
9 real estate taxes and the cost of sale, that will come out  
10 first. Then the Commission's judgment will be paid. The  
11 document that was submitted the other day by the defendant  
12 indicated that personal liabilities not on the property would  
13 also be satisfied. That's not the case.

14 Did I make that clear?

15 THE COURT: I understand. Mr. Levine, do you need any  
16 additional clarification on that?

17 MR. LEVINE: No, we're fine on that, your Honor.

18 THE COURT: Terrific. I believe there was a lien by  
19 the prior attorney that was indicated, Ira Sorkin. That was  
20 indicated as 290,000, I'm going from memory here, on the  
21 Baycrest house.

22 MR. ROESSNER: My understanding is -- I'm sorry, your  
23 Honor.

24 THE COURT: That was on one of the documents. If  
25 that's the case, that's fine.

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20

1 MR. ROESSNER: If there is a lien on the property from  
2 Mr. Sorkin, that would be paid first on time, first in right.  
3 That's on the 266 property.

4 THE COURT: I don't really care. I'm trying to  
5 surface whatever there is. I have no dog in this fight.

6 MR. LEVINE: Yes, I believe your Honor is recalling  
7 there was a debt listed on Mr. Xirinachs' schedule of debts  
8 that we submitted with his declaration. I don't believe there  
9 is a lien on either of these properties related to that.

10 THE COURT: All right. Terrific.

11 MR. LEVINE: With respect to Mr. Roessner's  
12 description of what I understand him saying, just so we're  
13 completely clear here. We don't want any ambiguity. When the  
14 liquidating agent sells the Baycrest property, the Huntington  
15 property, whatever existing priorities are in place now, they  
16 will have to be paid. They will be paid. And once those  
17 are -- the existing priorities, whatever is there. Whatever is  
18 left, they get.

19 THE COURT: I would assume you can't do any more than  
20 that. Is that right, Mr. Roessner?

21 MR. ROESSNER: Yes, your Honor. I envision this would  
22 be like a DoJ foreclosure. When the receiver is done, they'll  
23 make a report we'll submit to the Court about the distribution  
24 schedule and probably request a final order of payout, is the  
25 way I envision that would work.

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1           THE COURT: We would make sure the defendant has an  
2           opportunity to respond in case there are any issues that we are  
3           unaware of.

4           MR. ROESSNER: Yes, your Honor. I would do it by  
5           motion, yes.

6           THE COURT: All right.

7           MR. LEVINE: And yes, and Ms. Massey has indicated,  
8           that they will consider the existing offer in the same equal  
9           fashion as all other offers. And with that condition, I think  
10          we are in agreement.

11          THE COURT: All right. And that's acceptable to the  
12          government?

13          MR. ROESSNER: Yes, your Honor.

14          THE COURT: All right.

15          MR. LEVINE: And there is one more thing. I'm sorry,  
16          your Honor. Mr. Xirinachs -- and they are aware of this --  
17          Mr. Xirinachs' interest in the 263-265 property, we don't know  
18          the value of it. Initially it was a \$200,000 investment. It  
19          may be worth less or very little. He is going to take whatever  
20          reasonable necessary actions he can to transfer that interest  
21          and liquidate it for the Commission. The Commission is aware  
22          that he does not have the discretion to do that. There has to  
23          be approval by the LLC manager. So they are aware of that, I  
24          informed them of that, and they indicated to me they were going  
25          to take whatever actions they need to ensure that that process